

In the Matter of)	
)	
HORACE HENSLEY,)	
)	
Claimant,)	
)	
v.)	AHD No. 92-359H
)	OWC No. 115568
CHEECHI & COMPANY, INC.,)	
)	
and)	
)	
ATLANTIC MUTUAL INSURANCE COMPANY,)	
)	
Employer/Carrier.)	

Appearances:

HORACE E. HENSLEY, *pro se*

ALAN M. CARLO, ESQUIRE
For the Employer/Carrier

Before:

MELISSA LIN KLEMENS
ADMINISTRATIVE LAW JUDGE

COMPENSATION ORDER ON REMAND

STATEMENT OF THE CASE

This proceeding arises out of a claim for workers' compensation benefits filed pursuant to the provisions of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* (hereinafter "Act").

After timely notice, a full evidentiary hearing was held on January 31, 2006 before Malcolm

J. Luis-Harper,¹ Administrative Law Judge (hereinafter "ALJ"). Mr. Horace E. Hensley (hereinafter "Claimant") appeared in person.

¹ALJ Harper resigned from the Office of Hearings and Adjudication prior to the issuance of a decision in this matter. A Show Cause Order dated November 16, 2006 was served on the parties. Neither party filed objections in response to the Show Cause Order. Accordingly, this matter was reassigned to the undersigned for a decision based upon the record evidence as previously submitted.

Cheechi & Company, Inc. and Atlantic Mutual Insurance Company (hereinafter collectively “Employer”) appeared by counsel. Claimant testified on his own behalf.² Employer called no witnesses. Claimant Exhibit (hereinafter “CE”) No. A³ and Employer Exhibit (hereinafter “EE”) Nos. 1 - 7⁴ described in the hearing transcript (hereinafter “HT”) were admitted into evidence. The record closed on March 3, 2006. (HT p.49).

BACKGROUND AND PROCEDURAL POSTURE

On October 20, 1987, Claimant was awarded temporary total disability benefits from January 1, 1987 to the present and continuing in *Hensley v. Cheechi & Co.*, H&AS No. 89-437A, OWC No. 115568 (October 20, 1987).

²Claimant prepared a written submission and declined to testify on direct examination. (HT p.15-16). He was cross-examined and did testify in rebuttal.

³Prior to the formal hearing, Claimant had filed exhibits marked B and C for identification. Employer objected to those exhibits in writing on January 17, 2006, and they were not admitted into evidence.

⁴On or about January 19, 2006, Claimant filed an objection to Employer’s Exhibit 2. Over objection, the exhibit was received into evidence at the formal hearing.

In addition, on March 17, 2006, Claimant filed a letter submission including a February 24, 2006 report by Dr. Donald L. Thomas, Claimant’s treating physician. In this report, Dr. Thomas comments on EE7, a surveillance videotape offered as rebuttal evidence at the formal hearing. Claimant’s request to include Dr. Thomas’ February 24, 2006 report as an exhibit is denied as an attempt to submit post-hearing evidence in contravention of §32-1520(c) of the Act. (“No additional information shall be submitted by the claimant or other interested parties after the date of hearing, except under unusual circumstances as determined by the Mayor.”)

On January 6, 1989,⁵ Claimant was denied permanent total disability benefits because he had not reached maximum medical improvement. In a Supplemental Compensation Order issued less than two (2) months later, he was deemed eligible for a supplemental allowance.

Because Claimant did not suffer a work injury which combined with a pre-existing physical impairment to cause a substantially greater disability, on July 10, 1990, Employer’s request for Special Fund relief was denied. Employer appealed this decision, and although there is no subsequent decision included in the administrative file, given the procedural posture of this case, it is presumed at this time that all such appeals have been resolved regarding the July 10, 1990 Compensation Order.

ALJ Harper dismissed an Application for Formal Hearing on October 18, 1990. Employer appealed this ruling. Again, there is no subsequent decision included in the administrative file; therefore, given the substantial amount of time that has passed and the procedural posture of this case, it is presumed at this time that all appeals have been resolved regarding ALJ Harper’s October 18, 1990 order.

A formal hearing was held on June 5, 1992, and on April 30, 1993, Claimant was awarded permanent total disability benefits from January 1, 1989 to the present and continuing.

On November 19, 1997, Claimant requested a formal hearing to recover reimbursement for

⁵The Compensation Order contains a clerical error. The issuance date is listed as January 6, 1988; however, the formal hearing took place on December 5, 1988. Consequently, it is clear that the Compensation Order actually issued on January 6, 1989.

causally related medical expenses, prescriptions, and mileage charges. Following a pre-hearing conference, the parties agreed to resolve the issue on briefs, and on April 15, 1999, Hearings and Adjudications Examiner Jeffrey P. Russell awarded medical services (including swimming club fees) and travel expenses related thereto but not expenses claimed in connection with attendance at litigation proceedings.

Claimant's request for home health care assistance was denied in a Compensation Order issued on August 14, 2002, also by ALJ Russell. The Director reversed the decision of ALJ Russell on March 18, 2003, and the Director's decision was appealed to the D.C. Court of Appeals. The D.C. Court of Appeals dismissed the appeal on July 8, 2005 without addressing the merits, and on March 28, 2007, ALJ Russell issued a Compensation Order on Remand again denying the claim for relief.

On June 10, 2003, Claimant's request for a motorized wheelchair, acupuncture, and payment of the cost to live in an assisted living facility for the duration of his life was held in abeyance pending receipt of a utilization review report. The requests for a motorized wheelchair and payment for an assisted living facility were denied almost one (1) year later on June 4, 2004; Claimant was awarded authorization for acupuncture and massage therapy treatment. The Compensation Order Review Board (hereinafter "CRB")⁶ affirmed ALJ Jory's June

4, 2004 Compensation Order on August 17, 2006. This matter has been appealed to the D.C. Court of Appeals, but the issue of authorization for specific medical treatment does not have an impact on the issues to be addressed herein.

On August 14, 2003, Claimant filed another Application for Formal Hearing. On August 12, 2004, ALJ Verma denied Claimant's request for transportation expenses. ALJ Verma concluded that he lacked jurisdiction because at that time, the Director's March 18, 2003 Decision and Remand Order remained on appeal to the D.C. Court of Appeals, and that appeal involved issues synonymous with those in the case at bar. The CRB affirmed that Compensation Order on April 26, 2007. Claimant filed a request for reconsideration; the CRB denied that request in May 2007.

On October 28, 2005, Claimant filed another Application for Formal Hearing, and a Scheduling Order issued on November 9, 2005. A formal hearing was scheduled for January 31, 2006 in the above-captioned matter.

On January 10, 2006, Employer filed a Motion for Court Order directing Claimant to sign a Social Security Administration Release Form. Given that the above-captioned matter did proceed to a formal hearing on January 31, 2006, that motion was denied as moot in the August 31, 2007 Compensation Order.

On March 2, 2006, Claimant filed a written closing argument.⁷ Although the parties had

⁶§32-1521.01 of the Act and Title 7 of the District of Columbia Municipal Regulations, Chapter 1, section 118, and Chapter 2, sections 250 *et seq.* establishes a Compensation Order Review Board and set forth the authority and responsibilities thereof. The letterhead used for decisions and orders refer to the entity as the "Compensation Review Board," which is the shorter-form designation the Director of the Department of Employment Services used in Administrative Policy

Issuance No. 05-01 (February 5, 2005).

⁷Employer objected to Claimant's written closing argument on March 10, 2006. On March 13, 2006, ALJ Harper reminded Employer's Counsel that Claimant's submission was argument, not evidence, and

been directed to address only the ability of Claimant to receive a permanent partial disability award for schedulemembers when he already was receiving permanent total disability benefits, in his written closing argument, Claimant attempted to submit additional evidence post-hearing, specifically “addition [sic] comments and evidence relating to SOCIAL SECURITY DISABILITY BENEFITS.” (Emphasis in original.) Claimant’s request to submit irrelevant, post-hearing evidence regarding social security disability benefits was denied pursuant to §32-1520(c) of the Act, *supra*.⁸

In his written closing argument, Claimant also requested Employer/Carrier’s Exhibits 3, 6, and 7 be excluded from evidence because they were not “new evidence.” Modification of an existing Compensation Order and a *Snipes* hearing are limited to “new evidence which directly addresses the alleged change of conditions” (§32-1524(b) of the Act) which ordinarily is interpreted to mean evidence generated since the date of the last formal hearing; however, in the case *sub judice*, no Compensation Order had issued addressing the issue of indemnity benefits since 1993. All subsequent Compensation Orders addressed medical benefits issues. As such, the undersigned considered any evidence generated since June 5, 1992 (the date of last formal hearing to address indemnity benefits) to

qualify as “new evidence” on the issue of entitlement to indemnification benefits. *Snipes v. DOES*, 542 A.2d 832, 835 (D.C. 1988) (“Even assuming [§32-1524(b)] applies to the preliminary step of determining whether there is reason to believe a change of conditions has occurred, it seems evident that in this determination a hearing examiner must necessarily take into account what came before in determining whether a ‘change’ has occurred.”) In addition, these exhibits were relevant to the issue of whether Claimant was entitled to concurrent payment of permanent total disability benefits and permanent partial disability benefits. Thus, Claimant’s request to exclude EE3, EE6, and EE7 was denied.

While this matter remained pending, on September 21, 2006, Claimant filed another Application for Formal Hearing. That Application was dismissed on December 6, 2006 for a lack of jurisdiction.

Given the procedural posture of the above-captioned claim, on February 1, 2007, an order issued holding any further orders in AHD No. 92-359I in abeyance until all other outstanding Orders⁹ became final. Claimant appealed the December 6, 2006 dismissal order and the February 1, 2007 abeyance order to the CRB. Those appeals were consolidated, and on April 23, 2007, the CRB dismissed Claimant’s Applications for Review.

Claimant filed a request for “modification” of the February 1, 2007 order on June 29, 2007. That request was denied on July 25, 2007; in that same order, the abeyance order issued on

he indicated that Employer was permitted to submit proposed finding of fact and conclusions of law prior to the issuance of a Compensation Order. Employer did not do so.

⁸Although Claimant asserts he was proceeding *pro se* and he was medicated such that his ability for clear and rational presentation at the formal hearing was “almost impossible,” there is no indication in the record that Claimant was unwilling or unable to represent himself and to express his thoughts at the formal hearing.

⁹The term “Order” was used generically to refer to any final decision rendered by an adjudicatory body including but not limited to the Department of Employment Services and the District of Columbia Court of Appeals.

February 1, 2007 was lifted in 92-359I.

On May 9, 2007, Claimant filed a letter submission requesting a declaration of default. Because he did not specify what benefits, if any, had not been paid pursuant to a prior Compensation Order, he was ordered to file a computation of the benefits allegedly past due pursuant to each specific Compensation Order. Claimant's response was unintelligible. Consequently, his request for a default order was denied on June 12, 2007. On or about June 20, 2007, Claimant appealed this ruling to the CRB. The Order denying Claimant's request for a default order was not disturbed.

On January 19, 2007, the undersigned issued an Order holding the issuance of a Compensation Order in the above-captioned matter in abeyance until all other outstanding Orders¹⁰ became final. That Order was appealed, and the CRB dismissed Claimant's Application for Review on March 7, 2007. Thus, all other outstanding, relevant Orders having become final, the January 19, 2007 abeyance order was lifted in the August 31, 2007 Compensation Order.

Claimant appealed the August 31, 2007 Compensation Order to the CRB. On November 20, 2007, Judge Russell reversed and remanded the case for consideration of Claimant's request for medical care.

CLAIM FOR RELIEF

Claimant seeks an award under the Act of permanent partial disability benefits equal to a seventeen percent (17%) impairment of his right arm, a fourteen percent (14%) impairment of his left arm, a sixty (60%) percent

impairment of his right leg, and a twenty-five percent (25%) impairment of his left leg plus payment of causally-related medical expenses.¹¹

ISSUES¹²

1. The nature and extent of Claimant's disability, if any; and
2. Whether or not the disabilities to Claimant's extremities are causally related to his work-related condition.

FINDINGS OF FACT

The findings of fact and conclusions of law set forth in the numerous prior Compensation Orders issued in conjunction with this claim including the August 31, 2007 Compensation Order issued by the undersigned are the law and facts of this case, and the undersigned will not recite them specifically as stipulations or as findings. Nonetheless, to the extent that those findings of fact and conclusions of law are final, they do control this case.

DISCUSSION

¹¹At the hearing, there was no evidence of any outstanding medical bills. Absent any outstanding bills, this issue is not ripe for adjudication. *See, Thomas v. Department of Employment Services*, 547 A.2d 1034 (D.C. 1988).

¹²In his opening statement and his written closing argument, Claimant asserts his average weekly wage should be adjusted based upon a "concept of fairness." In 1987, the parties stipulated to an average weekly wage of Eight Hundred Seven Dollars and Sixty-nine Cents (\$807.69); stipulations cannot be disregarded by the undersigned. *Arden v. Trustee, Special Fund*, CRB No. 07-54, AHD No. 92-931A, OWC No. 239147 (May 10, 2007). Moreover, pursuant to the plain language of the Act, the average weekly wage is calculated as of the time of the injury; it remains fixed throughout the course of the claim.

¹⁰*See, footnote ^, supra.*

The undersigned has reviewed and has considered the totality of the evidence as well as the argument presented by the parties on the issues presented for resolution.¹³ To the extent an argument is consistent with the findings of fact, analysis, and conclusions of law contained herein, it is accepted; to the extent an argument is inconsistent therewith, it specifically is rejected.

In his November 20, 2007 Decision and Remand Order, Judge Russell¹⁴ found that

[b]ecause Petitioner included a claim for medical care and provided sufficient evidence from which the ALJ could have determined whether such care was incurred, and upon what dates, the failure to grant or deny the request for such is unsupported by substantial

¹³Although each documentary exhibit received in evidence is not specifically referenced herein, all evidence of record was reviewed as part of this deliberation.

¹⁴When he issued his April 15, 1999 and August 14, 2002 Compensation Orders, Judge Russell was the administrative law judge assigned to this claim. In February 2005, he ascended to the position of Administrative Appeals Judge on the CRB. The former Director of the Department of Employment Services issued a directive under which members of the CRB who had issued Compensation Orders prior to the creation of and the appointment to the CRB were to continue to act in the capacity of the ALJ on cases wherein the Compensation Order was remanded to the Office of Hearings and Adjudication, Administrative Hearings Division for further or additional consideration of issues that were or ought to have been addressed in the original Compensation Order. Consequently, he issued the March 28, 2007 Compensation Order on Remand pursuant to that directive. On November 20, 2007, Judge Russell issued the Decision and Remand Order in his capacity as an Administrative Appeals Judge.

evidence, and the denial is therefore reversed and the matter remanded for further consideration based upon the record. *Hensley v. Cheechi & Company and Atlantic Mutual Insurance Company*, CRB No. 07-162, AHD No. 95-359H, OWC No. 115568 (November 20, 2007) p.7.

In reaching this conclusion, Judge Russell relies upon Claimant's oral opening statement, a letter dated March 21, 2005 from Civista Health, and a listing of massage services by date and billing amount. Judge Russell rules that "[t]hese materials ["C3" and "C4"] render the ALJ's footnoted denial, on page 5 in footnote 11, of the claim for these services unsustainable." *Id.*

It is axiomatic that an opening statement is argument, not evidence. In order to be entitled to the requested relief, a party not only must argue that he is entitled to the request, he must prove such entitlement based upon evidence contained in the record.

The undersigned noted in her August 31, 2007 Compensation Order that Claimant was seeking an award under the Act of permanent partial disability benefits equal to a seventeen percent (17%) impairment of his right arm, a fourteen percent (14%) impairment of his left arm, a sixty (60%) percent impairment of his right leg, and a twenty-five percent (25%) impairment of his left leg plus payment of causally-related medical expenses. *Hensley v. Cheechi & Company and Atlantic Mutual Insurance Company*, AHD No. 95-359H, OWC No. 115568 (August 31, 2007) p.5. (Emphasis added.); *see also*, Claim for Relief, *supra*.

At the hearing, however, there was no evidence of any outstanding medical bills, and absent any

outstanding bills (*see, Hensley v. Cheechi & Company and Atlantic Mutual Insurance Company*, AHD No. 95-359H, OWC No. 115568 (August 31, 2007) p.5; *see also*, footnote 11, *supra.*), this issue is not ripe for adjudication. *See, Thomas v. Department of Employment Services*, 547 A.2d 1034 (D.C. 1988).

The fact of the matter is “C3” and “C4” are not in evidence. As stated in the August 31, 2007 Compensation Order,

[p]rior to the formal hearing, Claimant had filed exhibits marked B and C for identification. Employer objected to those exhibits in writing on January 17, 2006, and they were not admitted into

evidence. (HT p.5-6).

Hensley v. Cheechi & Company and Atlantic Mutual Insurance Company, AHD No. 95-359H, OWC No. 115568 (August 31, 2007) p.2; *see also*, footnote 3, *supra.*

As such, I find and conclude Claimant did not present any evidence of any outstanding medical bills, and this issue is not ripe for adjudication.

CONCLUSION OF LAW

Based upon a review of the record evidence as a whole, I find and conclude the request for outstanding medical bills was not ripe for adjudication at the January 31, 2006 formal hearing.

ORDER

It is **ORDERED** Claimant's claim for relief be and hereby is **DENIED**.

MELISSA LIN KLEMENS
ADMINISTRATIVE LAW JUDGE

January 7, 2008

Date

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent this _____ day of _____, 2008 to the following:

Mr. Mohammad R. Sheikh, Acting Assistant Director
Labor Standards
Department of Employment Services
64 New York Ave., N.E., Suite 3923
Washington, D.C. 20002

Hand Delivery

Mr. Charles Green, Associate Director
Department of Employment Services
64 New York Ave., N.E., Second Floor
Washington, D.C. 20002

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Alan M. Carlo, Esquire
Morgan, Carlo, Downs & Everton, P.A.
11350 McCormick Rd, Executive Plaza IV, Suite 100
Hunt Valley, MD 21031

Certified

Mr. Horace Hensley, *pro se*
6015 Purdun Drive
Temple Hills, MD 20748

Certified

Clerk, D.C. Court of Appeals
500 Indiana Ave NW # 6000
Washington, DC 20001
Case No. 07-AA-1369

Certified

TERRI THOMPSON MALLETT, CHIEF ALJ
ADMINISTRATIVE HEARING DIVISION

APPEAL RIGHTS

This order is effective upon filing with the Mayor pursuant to §21 of the Act, D.C. Code, as amended, §32-1520. 7 DCMR §230.12; §23a of the Act, D.C. Code, as amended, 2001, §32-1522a. Any party aggrieved by this Order may file an application for review with the Chief Judge Compensation Order Review Board,¹⁵ Labor Standards Bureau, Department of Employment Services.

Send Application for Review to:

**Compensation Review Board/Chief Judge
Department of Employment Services
Labor Standards Bureau
64 New York Ave., N.E.
Third Floor
Washington, D.C. 20002**

The Application for Review must be filed within 30 days of the date of the filing of this Order with the Mayor as provided in §23a(a) of the Act, D.C. Code, as amended, §32-1522a(a). An Application for Review is perfected by filing with the Chief Judge, Compensation Review Board, Labor Standards Bureau,

1. one (1) original and two (2) copies of an Application for Review,
2. one (1) original and two (2) copies of a Memorandum of Points and Authorities in support of the Application, and
3. certification that copies of the Application and Memorandum have been served by mail or delivery

7 DCMR §§230.1, 230.2; §23a of the Act, D.C. Code, 2001, §32-1522a. A complete copy of the foregoing documents should be filed with the Office of Hearings and Adjudication Administrative Hearings Division at 64 New York Avenue, N.E., Second Floor, Washington, D.C. 20002.

¹⁵D.C. Code Ann. § 32-1521.01 (2001) and Title 7 of the District of Columbia Municipal Regulations, Chapter 1, section 118, and Chapter 2, sections 250 *et seq.*, established a Compensation Order Review Board and set forth the authority and responsibilities thereof. The letterhead used for decisions and orders refer to the entity as the "Compensation Review Board", which is the shorter-form designation the Director of the Department of Employment Services used in Administrative Policy Issuance No. 05-01 (February 5, 2005).